Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1332

WILLIAM E. GOODMAN, *et al.*,
Petitioners,

vs.

McDONNELL DOUGLAS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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WILLIAM E. GOODMAN, *et al.*,
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vs.

McDONNELL DOUGLAS CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

Appellants pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on *October 1st, 1979.*

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 606 F. 2d 800 and is printed in Appendix A hereto, infra, p.p. A-1 to A-17. The Memorandum opinion of the United States District Court for the Eastern District of Missouri is reported at 456 F. Supp. 874 and is printed in Appendix B hereto, infra, p.p. A-18 to A-20.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 1st, 1979. Appellants did not file a Petition for Rehearing, or in the alternative, Motion for Hearing by the Court En Banc in said United States Court of Appeals for the Eighth Circuit. An application for an extension of time in which to file a petition for a writ of certiorari was timely filed and an order granting an extension of time was signed by Mr. Justice Blackmum on December 24, 1979, granting an extension to and including February 28, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether an analogous state statute of limitations can be applied to a claim under the Veteran's Reemployment Act in order to bar that claim under the Doctrine of Laches.

II. Whether a governmental delay in processing a veteran's claim can be attributed to the veteran so as to act as a bar to that claim under the Doctrine of Laches.

STATEMENT OF THE CASE

The ninety eight (98) veterans in this case are present and former employees of respondent McDonnel Douglas Corporation who brought suit pursuant to 38 U.S.C. § 2021 *et seq.*, commonly known as the Veterans' Reemployment Rights Act. Appellants seek in this action to recover wages lost as a result of McDonnell Douglas' failure to promote them when, after their return from military service, they each had qualified for promotion to the next higher grade and, but for their absence for military service, they each would have been promoted.

Each of these veterans brought their complaints to the United States Department of Labor. The first of said complaints originating in 1968. At first the local representative of the Department of Labor acquiesced in McDonnell Douglas's action in denying the veterans their promotions. However from 1972 through September 1977 the Department of Labor continuously investigated the complaints and entered into serious and extensive settlement negotiations with McDonnell Douglas by June 1976. In accordance with the special provision of the Act for legal representation by the United States, 38 U.S.C. § 2022, the government agreed to represent these aggrieved Veterans and, on September 29, 1977, filed a complaint on their behalf in the United States District Court for the Eastern District of Missouri. Jurisdiction being conferred upon that Court by 38 U.S.C. § 2022.

Each of the veterans involved in this case were initially employed by McDonnell Douglas in an other than temporary position in one of nine job classifications prior to his entering military service. Each left his job for the purpose of entering military service, and each was reinstated by defendant after being honorably discharged from the armed services.

McDonnell Douglas established a job program whereby there is a progression of three job grades within each of the nine job classifications. Each employee must undergo a 10 week testing period before being eligible to be promoted to the next job grade. If the employee is found to be qualified he would then be promoted to the next higher grade. However McDonnell Douglas instituted a policy that the employee would not be promoted though qualified, if at the time there was in effect a "freeze in upgrading". This freeze was determined by the defendant based on economic factors of the company at the time it was placed in effect. Each of the veterans involved in this suit were found to be qualified for promotion at the end of the 10 week test period but were not promoted because of McDonnell Douglas' policy of placing a freeze on upgrading. The basis

of the veterans' complaint was that if they had not entered military service, they would have been promoted since during the time they were in military service the freeze in upgrading was not in effect. As a consequence of McDonnell Douglas' policy, employees having less time with the company than the veterans, were holding higher job grades. The defendants policy thereby penalized the veterans for having served in the military service. This policy effecting the veterans was in effect from the period of 1968 to 1972.

In 1972, McDonnell Douglas through the efforts of the Aerospace Workers Union, modified its policy concerning delays in upgrading as it related to veterans. Effective May 15, 1972, the company initiated the following policy:

> An employee who returns from military service to his former classification and grade, and who subsequently becomes qualified for upgrading in that classification, will not be denied such upgrading, if a less senior employee who entered the classification and grade later than he did then holds a higher grade of that classification.

None of the veterans were compensated for their loss of wages as a result of the job freeze. Moreover, no adjustment was made to compensate for the fact that these belatedly upgraded veterans were being placed at the bottom of the next higher grade, even though they would have been further along, and earning higher wages, in that grade if they had been upgraded at the appropriate time.

All but three of the 98 veterans involved in this litigation returned to their jobs between 1968 and 1971. Following their reinstatment five (5) of the veterans as far back as 1968, filed complaints with the United States Department of Labor's Office under the Veteran's Reemployment Rights. At that time a single local representative of the Department of Labor investigated the claims and stated to the veterans that he was of the opinion that McDonnell Douglas' policy was legal. However

in 1972 a task force from the Department of Labor undertook an investigation of the claims and in April of 1972 the Department of Labor advised McDonnell Douglas that their policy was illegal and against the Veterans' Reemployment Rights. By April of 1974, the Labor Department informed the company, that the claims of the veterans were sent to the Regional and National Office of the Solicitor of Labor, and would be submitted to the Department of Justice for litigation if the claims were not resolved.

Following extensive consideration of the veterans' claims by the national office of the Department of Labor in Washington, D. C., the Department contacted McDonnell Douglas on June 10, 1976 and opened serious settlement discussions with the company. These settlement negotiations continued through June of 1977, when this matter was turned over to the Department of Justice. The Justice Department also engaged in settlement negotiations with McDonnell Douglas. The Justice Department commenced this action on September 29, 1977 by filing suit on behalf of 98 veterans in the United States District Court for the Eastern District of Missouri.

By Memorandum and Order of August 25, 1978 (Appendix B hereto, infra, P. A-18), (456 F. Supp. at 875-876), the district court denied plaintiff's motion for partial summary judgment and granted defendant's motion to dismiss under the doctrine of laches. Accordingly, the court dismissed plaintiffs' complaint with prejudice.

The plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit and that Court, in its opinion of October 1, 1979 (Appendix A hereto, infra, P. A-1) (606 Fed. 2d 800) affirmed the judgment of the District Court. The veterans were advised on December 1, 1979 by the United States Attorney, Eastern District of Missouri, that they and the Solicitor General of the United States had determined that the Government will not continue to provide legal representation in this case for purposes of seeking review in the Supreme Court of the United States.

REASONS FOR GRANTING WRIT

I. The decision of the court below in affirming the district court decision in applying the analogous statute of limitations in Missouri for contract action is in conflict with various United States Court of Appeals Circuits. The court below conceded that the Supreme Court in Gardner v. Panama Railroad Co., 342 U.S. 29, 31 (1951) prohibited the mechanical application of a State Statute of limitation for contract actions, but felt that the Supreme Court did not explain the relative weight to be accorded to an analogous state statute of limitation. It conceded that the lower federal courts have ascribed varying degrees of importance to analogous statutes of limitations. Some courts holding that the running of an analogous statute of limitation creates a rebuttable presumption of unreasonable delay and prejudice flowing therefrom. E. g. Churma v. United States Steel Corp., 514 F. 2d 589, 593 (3rd Cir. 1975); Gruca v. United States Steel Corp., 495 F. 2d 1252, 1259 (3rd Cir. 1974); Leonick v. Jones & Laughlin Steel Corp., 258 F.2d 48, 50 (2d Cir. 1958) (See Appendix A-8). Other courts have completely disregarded statutes of limitations in considering a defense of laches, e.g.; Davis v. Alabama Power Co., 383 F. Supp. 880, 894, aff'd. 542 F.2d 650 (1976), aff'd. 431 U.S. 58 (1977); Smith v. Industrial Employers and Distributors Association, 385 F. Supp. 1281, 1287 (N.D. Cal. 1974), aff'd. 546 F. 2d 314 (9th Cir. 1976) cert. denied. (See Appendix A-8). Others have treated them as merely one element in congeries of factors to be considered in determining whether the length of delay was unreasonable and whether the potential was great e.g., (See Appendix A-9). The lower court in the instant case found that the latter approach accords most favorably with the purpose of the doctrine of laches and congressional intent regarding the doctrine's application to claim pursuant to 38 U.S.C. § 2021 et. seq., to protect veterans reemployment rights. However the court below goes on to state that a congressional amendment, in 1974 of the statutes dealing with veterans' reemployment rights

expressly prohibited the use of state statutes of limitations (See Appendix C, 38 U.S.C. § 2201).

The foregoing clearly indicates that there is a conflict of opinions among the lower federal courts in applying analogous state statutes of limitations to the doctrine of laches. The district court based it's opinion on the 5 year Missouri statute of limitations and dismissed the veterans case with prejudice. The court of appeals affirmed their decision. In view of the conflicting decisions in this area this issue will remain in dispute until settled by the Supreme Court. It is of particular importance, since in this case it is dealing with the reemployment rights of veterans. Settlement of the question by this court is plainly in the public interest, since it is dealing with veterans rights, it is most likely to be presented in almost every district court.

II. The decision of the court below in the instant case which allows the governmental delay to be asserted against the plaintiffs (veterans) and to use that delay to bar the assertion of the veterans claim is in direct conflict with decisions of other circuits. The following court decisions have refused to use delay by the Department of Labor in handling a veterans's claim to serve as a basis for barring the assertion of that claim. Barrett v. Grand Trunk Western Railroad Co., 86 C.C.H. Lab. Cas. 11,334 at 21.262 (N.D.Ill. 1979); Schultz v. Green Bay & Western Railroad Co., 85 C.C.H. Lab. Cas. 11.072 to 20,187 (E.D.Wis. 1979); Rozas v. Cameron Iron Works Inc., 83 Lab. Cas. 10,407 to 17.625 (S.D.Tex. 1977); Hirschberg v. Braniff Airways, Inc., 404 F. Supp. 869, 872-74 (E.D.N.Y. 1975); Stinner v. United States Steel Corp., 73 C.C.H. Lab. Cas. 14,352 at 29.127 (W.D.Pa. 1974). Other courts have held that the governmental delay cannot be asserted if it is shown that the claim was subjected to good faith negotiations by the governmental agency (See Appendix A-12). Also, some courts have attributed to the veterans the delay during the time the matter was pending before the Department of Labor (See Appendix A-12). The court below noted that a committee report, which is part of the

legislation history of the 1974 amendment of the veterans' reemployment right statute, felt that it was inappropriate to charge the veteran the time spent by the Department of Labor. S. Rep. No. 93-907, 93rd Cong., 2d. Sess. 111-12, 113 (1974). (Appendix A-13).

The court below after reviewing all these decisions, then concludes that even though it cannot be disputed that the Department of Labor has unfairly treated the veterans in this case, they hold the veterans responsible for that delay merely because the veterans chose to rely upon the services of the Department of Labor rather than secure private counsel.

In reviewing the instant case and the cases of other circuits, it can only be concluded, that there are conflicting decisions among the circuits, as to whether a governmental delay can be asserted against the veterans claims and act as a bar to that claim. The matter has been in dispute and must remain so until settled by the Supreme Court. Settlement of the questions by this Court is plainly in the public interest, since it deals with the claims of veterans under the Reemployment Act and is bound to be presented in every district court. In dealing with veterans rights it is most important that these rights be treated fairly and uniformly.

III. The decision of the court below is believed to be erroneous and the conflicting decisions correct.

a. The mechanical application of the analogous state statute limitations by the district court and affirmed by the Court of Appeals was in error. The Supreme Court in Gardner v. Panama Railroad, supra prohibited such application and the congressional amendment in 1974 of the statutes dealing with veterans reemployment rights expressly prohibit the use of state statute of limitations in any manner (Appendix A-23). Therefore, any application of the state statute of limitation to the Doctrine of Laches is erroneous and any decision based on that application should not have been affirmed.

b. The court below concluded that the district court had not abused its discretion by barring the veterans claim based on the doctrine of laches. It attributed the delay entirely to the Department of Labor and then stated that the veterans were in a sense co-conspirators since they had voluntarily relied upon the services of the Department of Labor rather than seek private counsel. It is well known that one of the functions of the Department of Labor is to investigate and process these types of claims. Now the court tells the veterans that because they relied solely on the services of this governmental agency, they too are guilty of laches. The Department of Labor function is to avoid unnecessary litigation and yet the court in a sense is punishing the veterans for the reliance they placed in that agency. The court below discussed the weighing of equities in applying the doctrine of laches. In so doing they discuss how McDonnell Douglas was also mistreated, in that the Department of Labor misled them to believe that their employment practices were justifiable (See Appendix A-13). This reliance was based solely on the opinion of a local representative of the Department of Labor. This reliance by McDonnell Douglas was not justifiable in view of 38 U.S.C. § 2021 Para.(b)(2)(Appendix A-22). There is no question that McDonnell Douglas, a giant corporation, was in a much better position to decide whether or not their employment practices violated the veterans rights, yet they chose to rely on the opinion of one local representative of the Department of Labor. Is this justifiable reliance, I think not.

McDonnell Douglas claims that it was prejudiced due to the delay since if the suit was brought sooner they could have forced the Federal Government to compensate them for any loss as a result of the veterans claims. The court did not accept this argument. (See Appendix A-16). However the court went on to conclude that only minimal deprivation of statutory rights of the veterans could possibly have resulted from McDonnell Douglas' practices (See Appendix A-17). On the one hand the company is complaining that the delay would result in a considerable loss of

monies which the court rejects and on the other hand the court states that the loss to the veterans in wages is minimal. The lost wages to the 94 veterans in this case is estimated at $300,000.00 and the highest loss in wages to any one individual is estimated at $6,000.00. Even in this era of high inflation, these figures could not be considered minimal.

The court went on to conclude that McDonnell Douglas' reliance upon an interpretation of a government agency (one local representative) was promoted in some degree by the veterans' failure to promptly institute litigation and thus prejudice the company's position in such a degree so as to apply the doctrine of laches. (Appendix A-16). The court concluded that both parties have suffered at the hands of a government agency, but because the veterans relied on that governmental agency, they should lose their rights under the Veterans Reemployment Act.

Throughout the course of this litigation the veterans have relied on various governmental agencies and up until this point to their detriment. The Department of Labor's interpretation and reinterpretation caused the very delays which cost the veterans their law suit. The U. S. Attorney's office although promptly filing suit advised the veterans, during the course of litigation, to reject offers of $29,500.00 and $60,000.00 made by McDonnell Douglas to compromise and settle the claims. The veterans accepted the advice and rejected the offers. Then after the Court of Appeals affirms the District Court's decision, the U. S. Attorney advised the veterans that they will no longer represent them on a Writ of Certiorari and advised them they have the right to seek private counsel, which the Court of Appeals claims they should have done originally.

The appellates (veterans) not only argue that there is sufficient conflict in opinions, for this court to review this case, but also state that if ever a case justified review it is this instant case. It was decided on the Equitable Doctrine of Laches and that

doctrine was applied due solely to Federal bureaucratic inertia and the veterans' detrimental reliance on that body. It is the veterans' contention that they should be able to rely on these various governmental agencies, since their very existence depends upon the acts performed by the veterans during war time. Due to the fact that this suit deals with veterans, persons who have defended this great country, they above all should not be deprived of their rights due to the ineptness of a governmental agency.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition For Writ of Certiorari be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1980, I served the foregoing Petition For Writ of Certiorari by causing three (3) copies to be mailed to:

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1701

William E. Goodman, Estel W. Dunn, Paul J. Hepperman, Stanley Walker, Ronald Caldwell, Ronald D. Williams, Wesley D. Lancaster, Michael T. Zoellner, Jimmy R. Hults, Michael W. Ashbaugh, Eugene K. Bartlett, Peter Bastas, Gary R. Bauer, Larry J. Beadle, Richard L. Beckemeyer, Danny E. Bell, Burlington I. Benson, Walter G. Blank, Roger F. Boenecke, Warren M. Bogel, Anthony J. Bonmarito, William Box, Jr., Gary R. Burleson, Joe C. Bushong, Hans C. Carney, Patrick M. Carroll, Michael J. Cooke, Meryl G. Counts, William R. Daugherty, Melvin G. Davis, Ronald M. Eudy, William D. Floyd, James H. Foutch, John M. Gerardi, Harry E. Gibson, Jr., John H. Gilmore, Robert A. Glastetter, Dennis L. Goeway, Ronald J. Haar, Raymond K. Her berger, Robert J. Hoffman, Gregory G. Holdman, Ronald J. Houle, Jackie D. Hurt, Dennis E. Iborg, Jerry W. Isenhart, Sammy W. Johnson, Robert L. Jones, Steve Kassa, Jr., Walter E. Klemme, Ronald V. Kujawa, Lawrence B. Lang, Gary L. Little, Charles W. Lovelace, Ronald W. Maag, Francis M. Marietta, Leonard A. Marsey, James A. McDonald, Leo G. Mesiner, Jr., Paul R. Milligan, Darrell A. Morris, George C. Moseman, Jr., Donald L. Mouser, Ivan C. Niehaus, Edward N. Noah, Jr., Larry G. Owens, Kenneth E. Pace, Paul M. Phillips, Robert H. Pirtle, William H. Porzel, Richard C. Root, Eric J. Rueder, Walter F. Schaub, Daniel Schomber, Kenneth D. Sellers, Larry W. Smith, Michael G. Spray, Larry L. Summers, William Swafford, Thomas L. Talley, Steven V. Taylor, Buford R. Thompson, Lindell R. Thompson, Issac Threats, Jr., Glenn R. Travers, Terry F. Vaughn, Artemus Wallace, Jr., Johnny M. Ward, Charles L. Warren, Robert M. Weaver, Curtis P. West, Leland R. Whitaker, Ronnie W. Whitt, David E. Williams, Wayne E. Williams, and Jack J. Wilson,

Appellants,

v.

McDonnell Douglas Corporation,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: June 12, 1979
Filed: October 1, 1979

Before GIBSON, Chief Judge,
ROSS and HENLEY, Circuit Judges.

GIBSON, Chief Judge.

Appellants, ninety-eight veterans of the United States Armed Forces who are present or former employees of McDonnell Douglas Corporation, brought suit against McDonnell Douglas pursuant to 38 U.S.C. § 2021 *et seq.* (Veterans' Reemployment Rights Act) to recover for alleged violation of their reemployment rights. On August 25, 1978, the District Court[1] denied appellants' motion for partial summary judgment[2] and granted appellee's motion to dismiss on the basis of laches.[3] The veterans appeal from the order dismissing their complaint with prejudice. Title 28 U.S.C., section 1291, vests this court with jurisdiction.

Each veteran left permanent employment with McDonnell Douglas to enter active duty with the armed services, was honorably discharged, and thereafter resumed employment with McDonnell Douglas. In reinstating the veterans, McDonnell Douglas followed its established policy.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] Only ninety-four of the appellants participated in the motion for summary judgment.

[3] The District Court opinion is reported at 456 F. Supp. 874 (E.D. Mo. 1978).

McDonnell Douglas separates its employee operations into various job classifications.[4] Each job classification divides into three labor grades (3, 2, 1) and within each grade employees progress through a specific number of ten-week segments. After completing the progression through the ten-week segments, the employee enters a ten-week test period, after which he is evaluated to determine whether he is qualified for upgrading to the next grade. Because progression through the ten-week segments is automatic, McDonnell Douglas's employment policies provided that returning veterans should be reinstated at the top of the job grade and the classification in which they were employed at the tie they left to enter military service, regardless of the number of ten-week segments within the grade that each veteran had completed prior to entering military service. Accordingly, upon reinstatement each veteran immediately entered the ten-week test period.

Following his reinstatement, at some point each veteran was found qualified to be upgraded to the next higher grade within his job classification, but was not in fact upgraded because the company had placed a freeze on upgrading to the next grade. McDonnell Douglas freezes upgrading whenever it determines that there is no current need for more employees in the higher grade or when a layoff is in effect in the higher job grade. Freezes have been utilized at McDonnell Douglas since the early 1950's and recognized in collective bargaining agreements since 1958.[5]

[4] *E.g.*, sheet metal assembler and riveter, mechanic—electrical and radio, sheet metal worker, grinder—precision tool and cutter, builder—jig and fixture, etc.

[5] McDonnell Douglas's pre-1972 collective bargaining agreements prevented the upgrading of any employees, including veterans, at a time when a freeze was in effect, but under the new company policy, accepted through collective bargaining, a freeze is ineffective against a veteran if a less senior employee had been previously found qualified and had been upgraded. Thus, a veteran was upgraded if he had been bypassed by a junior employee.

The veterans contend that the company's failure to upgrade them immediately upon their qualification violated their statutory reemployment rights to be placed in the position they would have acquired by virtue or continued employment but for their absence in military service. *See Tilton* v. *Missouri Pacific Railroad Co.,* 376 U.S. 169, 175, 181 (1964); *Oakley* v. *Louisville & Nashville Railroad Co.,* 338 U.S. 278, 283 (1949); *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946); *Barrett* v. *Grand Trunk Western Railroad Co.,* 581 F.2d 132, 136 (7th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3586 (March 5, 1979). The freezes in upgrading were not in effect while appellants were engaged in military service, since skilled labor is in much shorter supply during a war economy than during the vagaries of a peacetime economy. Thus there would have been no delay in the veterans' upgrading had they received their qualification during the period of time they spent in military service.

McDonnell Douglas resists the veterans' interpretation of their rights on the basis that their advancement depended upon the company's discretionary choice regarding both whether the veteran was qualified for upgrading and whether a freeze in upgrading should be put into effect. It asserts that these discretionary choices would preclude the returning veterans from showing with reasonable certainty that, as a matter of foresight, they would have enjoyed advancement simply by virtue of continuing employment during the time in military service. *See McKinney* v. *Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 272 (1958).

The veterans were reinstated at various times between 1968 and 1972 inclusive.[6] Certain appellants, disappointed by the delay in upgrading, complained to the Department of Labor

[6] The earliest reinstatement of an appellant veteran, Haar, occurred January 8, 1968. Appellant Haar qualified for upgrading March 18, 1968. He was not actually upgraded until May 15, 1972, as a result of a change in the collective bargaining agreement.

(hereinafter sometimes referred to as the Department) within a few months after having been rated qualified for upgrading.[7] The Department responded to the veterans' complaints by indicating approval of McDonnell Douglas's treatment. This response was consonant with the Department's position that it had assumed in response to previous complaints from veterans returning to employment with McDonnell Douglas, some dating back at least as far as 1962. Since the Department reports its investigation of complaints to both the company which is the subject of the challenged practice and the complainant, both McDonnell Douglas and the veteran appellants were aware of the Department's position.[8]

Unsatisfied by this response from the Department of Labor, certain veterans continued to pursue their claims by applying pressure through the union to effectuate a change in McDonnell

[7] Five appellants, William E. Goodman, Patrick M. Carroll, Ronald J. Haar, Lindell Thompson, and Leo G. Mesnier, filed claims with the Labor Department's Office of Veterans' Reemployment Rights prior to 1972. These five refiled their claims in 1972 even though they had received in response to their prior claims correspondence indicating Labor Department endorsement of McDonnell Douglas's policies. The other appellants filed their claims with the Department of Labor between 1972 and 1974. Appellant Goodman resumed employment with McDonnell Douglas on January 7, 1969. He received approval for upgrading on April 21, 1969, but could not move into the next grade because a freeze was in effect. The record does not reveal the exact date he submitted his complaint to the Department, but the letter of response from the Department is dated November 13, 1969. Thus, it is reasonable to assume he made his complaint within five months of the treatment challenged in this suit.

[8] An example of the Department's response is a letter from George M. Vaughn, Field Representative, U. S. Department of Labor, Kansas City, Missouri, to appellant Goodman on November 13, 1969, a copy of which was sent to McDonnell Douglas. The letter concludes by stating that the employer "has not violated his statutory obligations nor your statutory rights in this matter."

Douglas's practice. These efforts realized fruition in January of 1972 when McDonnell Douglas's labor negotiator acceded to the union's request and amended the collective bargaining agreement effective May 15, 1972.[9]

Thereafter, sometime in August or September of 1972, Department of Labor representatives informed McDonnell Douglas that because 120 or more veterans had recently complained to them they were reinvestigating its practice in regard to delay in upgrading. McDonnell Douglas made a written response to the Department in October of 1972. The Department informed the company in mid-1976 that it considered their practice illegal.[10] Negotiations between the Department and McDonnell Douglas ensued but did not produce agreement, and on June 20, 1977, the Labor Department forwarded the cases to the Department of Justice which, on September 29, 1977, filed suit on behalf of the veterans.

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[9] The language incorporated into the collective bargaining agreement provides in pertinent part:

> An employee who returns from military service to his former classification and grade, and who subsequently becomes qualified for upgrading in that classification, will not be denied such upgrading solely by reason of a delay in upgrading, if a less senior employee who entered the classification and grade later than he did then holds a higher grade than that classification.

Approximately 76 of the appellants were immediately upgraded upon the implementation of this provision.

[10] The status of the claims within the Department between 1972 and 1976 is difficult to ascertain. The record contains nebulous assertions that Department employees at various levels within the bureaucracy were subjecting the claims to investigation and analysis. This stagnation in the processing of the claims evidently upset some of the appellants, as an uncontroverted affidavit by a Labor Department employee states that appellants "continuously contacted the [Department] seeking information concerning the processing of their cases attempting to hasten resolution of the matter at hand. * * * Certain of the plaintiffs and the union even carried their complaints to senators and congressmen."

The sole issue on appeal is whether the District Court abused its discretion in dismissing the complaint with prejudice on the basis of the doctrine of laches.[11]

The doctrine of laches is an equitable defense, and the United States Supreme Court in *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 30 (1951), stated that "the existence of laches is a question primarily addressed to the discretion of the trial court." This does not mean, however, that the District Court's decision is unfettered by appropriate standards or shielded from thorough appellate review. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416 (1975). The basic elements of laches are well established. For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant. *Gardner* v. *Panama Railroad Co.,* 342 U.S. 29, 31 (1951); *Russell* v. *Todd,* 309 U.S. 280, 287 (1940); *Southern Pacific Co.* v. *Bogert,* 250 U.S. 478, 490 (1919).

In applying the doctrine of laches, an important consideration is the appropriate role of an analogous statute of limitation. Appellants argue that the District Court abused its discretion by mechanically applying the analogous statute of limitation in Missouri for contract actions. This approach has been proscribed by the Supreme Court in *Gardner* v.*Panama Railroad Co.*, 342 U.S. 29, 31 (1951), but the Court has not explained the relative weight to be accorded to an analogous statute of limitation.

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[11] Although the District Court also denied appellants' motion for partial summary judgment because the question of "[w]hether the upgrading was automatic or discretionary presents a crucial issue of materal fact," 456 F. Supp. at 875, we do not have jurisdiction to review the denial of this motion. The denial of a motion for summary judgment is not an appealable order, and the dismissal on the basis of laches does not convert the denial of summary judgment into a "final judgment" for purposes of appeal. *Burke* v. *Ernet W. Hahn, Inc.*, 592 F. 2d 542, 546 n.3 (9th Cir. 1979).

The lower federal courts have ascribed varying degrees of importance to analogous statutes of limitation. Some courts have held that the running of an analogous statute of limitation creates a rebuttable presumption of unreasonable delay and prejudice flowing therefrom. *E.g., Churma* v. *United States Steel Corp.*, 514 F.2d 589, 593 (3d Cir. 1975); *Gruca* v. *United States Steel Corp.*, 495 F.2d 1252, 1259 (3d Cir. 1974); *Leonick* v. *Jones & Laughlin Steel Corp.*, 258 F.2d 48, 50 (2d Cir. 1958); *Schultz* v. *Green Bay & Western Railroad Co.*, 85 CCH Lab. Cas. ¶ 11,072 at 20,187 (E.D. Wis. 1979); *Grisby* v. *Babcock* v. *Wilcox Co.*, 85 CCH Lab. Cas. ¶ 10,983 at 19,798 (N.D. Ohio 1978); *Smith* v. *Continental Airlines, Inc.*, 70 CCH Lab. Cas. ¶ 13,501 at 26,650 (C.D. Cal. 1973); *Muscianese* v. *United States Steel Corp.*, 354 F. Supp. 1394, 1399 (E.D. Pa. 1973); *Whitmore* v. *Norfolk & Western Railway Co.*, 61 CCH Lab. Cas. ¶ 10, 573 at 17,894 (N.D. Ohio 1969); *accord, Public Administrator of the County of New York* v. *Angela Compania Navieria, S. A.*, 592 F.2d 58, 64 (2d Cir. 1979), *appeal docketed,* No. 78-1695 (U.S. Sup. Ct. May 11, 1979); *TWM Manufacturing Co., Inc.* v. *Dura Corp.*, 592 F.2d 346, 348-49 (6th Cir. 1979); *Ramos* v. *Continental Insurance Co.*, 493 F.2d 329, 332 n.3 (1st Cir. 1974). Other courts have completely disregarded statutes of limitation in considering a defense of laches, *e.g., Scott* v. *Atchison, Topeka & Santa Fe Railway,* 78 CCH Lab. Cas. ¶ 11,291 at 20,440-41 (C.D. Cal. 1976); *Farrell* v. *The Chesapeake and Ohio Railway Co.*, 77 CCH Lab. Cas. ¶ 11,157 at 19,952 (W.D. Pa. 1975); *Davis* v. *Alabama Power Co.*, 383 F. Supp. 880, 894 (N.D. Ala. 1974), *aff'd,* 542 F.2d 650 (1976), *aff'd,* 431 U.S. 581 (1977); *Smith* v. *Industrial Employers and Distributors Association,* 385 F. Supp. 1281, 1287 (N.D. Cal. 1974), *aff'd* 546 F.2d 314 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); *Stinner* v. *United States Steel Corp.*, 73 CCH Lab. Cas. ¶ 14,352 at 29,126 (W.D. Pa. 1974); *Ufland* v. *Buffalo Courier Express, Inc.*, 74 CCH Lab. Cas. ¶ 10,308 at 17,077 (W.D.N.Y. 1974); *accord, Delman* v. *Federal Products Corp.*, 251 F.2d 123, 127 (1st Cir. 1958); *Brundage* v.

United States, 504 F.2d 1382, 1386 (Ct.Cl. 1974), *cert. denied,* 421 U.S. 998 (1975), or treated them as merely one element in the congeries of factors to be considered in determining whether the length of delay was unreasonable and whether the potential for prejudice was great, *e.g., Brown* v. *County of Buena Vista,* 95 U.S. 157, 160 (1877); *Rozas* v. *Cameron Iron Works, Inc.*, 83 CCH Lab. Cas. ¶ 10,407 at 17,625 (S.D. Tex. 1977); *Deski* v. *National Cash Register Co.*, 78 CCH Lab. Cas. ¶ 11,198 at 20,100-01 (S.D. Ohio 1975); *Hirschberg* v. *Braniff Airways, Inc.*, 404 F. Supp. 869, 874 (E.D.N.Y. 1975); *accord, Hill* v. *W. Burns & Co.*, 498 F.2d 565, 569 (2d Cir. 1974). We find that the latter approach accords most favorably with the purpose of the doctrine of laches and congressional intent regarding the doctrine's application to claims pursuant to 38 U.S.C. § 2021 *et seq.*, to protect veterans' reemployment rights.[12]

In *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396 (1946), the Supreme Court stated:

> Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisie for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. * * *

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[12] To a large extent even courts applying a rule of a rebuttable presumption based upon an analogous statute of limitation have treated the presumption more as a permissive inference and have fully examined the peculiar facts of the cases before them. *Larios* v. *Victory Carriers, Inc.*, 316 F.2d 63, 66-67 (2d Cir. 1963); *Carmalt* v. *General Motors Acceptance Corp.*, 302 F.2d 589, 590 (3d Cir. 1962); *Leonick* v. *Jones & Laughlin Steel Corp.*, 258 F.2d 48, 50 (2d Cir. 1958); *Muscianese* v. *United States Steel Corp.*, 354 F. Supp. 1394, 1400 n.1 (E.D. Pa. 1973).

> Equity exchews mechanical rules; it depends on flexibility. Equity has acted on the prinicple that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relationship of the property or the parties." *Galliher* v. *Cadwell,* 145 U.S. 368, 373; *see Southern Pacific Co.* v. *Bogert,* 250 U.S. 483, 488-89.

The doctrine of laches is premised upon the same principles that underlie statutes of limitation: the desire to avoid unfairness that can result from the prosecution of stale claims. *Costello* v. *United States,* 365 U.S. 265, 282-83 (1961); *Brown* v. *County of Buena Vista,* 95 U.S. 157, 161 (1877). However, the operation of laches departs from that of statutes of limitation in that laches is a more flexible doctrine. The Supreme Court has repeatedly emphasized "[t]hat no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case." *The Key City,* 81 U.S. (14 Wall.) 653, 660 (1871). While courts may benefit from legislative determinations of when delay becomes unreasonable and prejudice may be presumed, undue deference to this judgment may result in a dereliction of the duty to examine all aspects of the equities affecting each case. Laches is considered an affirmative defense, *see* FED. R. CIV. P. 8(c), and generally the burden of persuasion on an affirmative defense rests with the defendant. *Law* v. *Royal Palm Beach Colony, Inc.,* 578 F.2d 98, 101 (5th Cir. 1978); *Matter of Henderson,* 577 F.2d 997, 1002 (5th Cir. 1978); *Wheat* v. *Hall,* 535 F.2d 874, 876 (5th Cir. 1976); *but see Bernard* v. *Gulf Oil Co.,* 596 F.2d 1249, 1256 n.5 (5th Cir. 1979). Courts may, however, take into account which party can best provide proof of any particular aspect of a case. Thus a defendant may better be able to establish that it has been prejudiced because of delay, while the plaintiff will generally have greater knowledge of the reasons for the delay and any excuse therefor. *See EEOC* v. *Westinghouse Electric Corp.,* 592 F.2d 484 (8th Cir. 1979); *Hill* v. *W. Bruns & Co.,* 498 F.2d 565, 568 (2d Cir. 1974). Mechanical rules creating presumptions based upon legislative determinations also may divert a court's attention from the real considerations involved in a determination of laches. A court should focus upon the length of the delay, the reasons therefor, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim.

Furthermore, congressional amendment, in 1974, of the statutes dealing with veterans' reemployment rights expressly prohibited the use of statutes of limitation to preclude actions to enforce the reemployment rights. This clarification of congressional intent suggest that Congress did not consider the differing state legislative determinations regarding stale claims to be an appropriate guide for courts confronted with veteran reemployment actions. Application of laches furthers a policy of ensuring that the rights available to returned veterans remain as uniform as possible throughout the country. Over-reliance on state statutes of limitation would detract from this goal.[14] As stated in *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355, 367 (1977): "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."

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[13] 38 U.S.C. § 2022 states in pertinent part: "No State statute of limitations shall apply to any proceedings under this chapter."

[14] On appeal, appellants suggest in the interest of uniformity that a more appropriate statute of limitation to refer to for guidance in this case is either 28 U.S.C. § 2501, 2401, or 2415(a), each of which establishes a six-year statute of limitation. The brief submitted by the Department of Labor on behalf of appellants states: "Now that we have had occasion to consider fully the impact of the legislative

We now examine the application of the doctrine of laches to the case at bar. The first issue we address is whether the governmental delay in processing the claims should accrue against the appellant veterans. It has been charged that attributing this delay to the veterans unfairly penalizes the veterans and disembowels the Act. *Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F.2d 815, 821 (7th Cir. 1972) (Tuttle, J., concurring in part and dissenting in part). However, some courts have attributed to the veterans the delay during the time the matter was pending before the Department of Labor. *Churma* v. **United States Steel Corp.**, 514 F.2d 589, 593 (3d Cir. 1975); *Bell* v. *Aerodex, Inc.*, 473 F.2d 869, 873 (5th Cir. 1973); *Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F.2d 815, 819-20 (5th Cir. 1972). Other courts have refused to use delay by the Department of Labor in handling a veteran's claim to serve as a basis for barring the assertion of that claim. *Barrett* v. *Grand Trunk Western Railroad Co.*, 86 CCH Lab. Cas. ¶ 11,334 at 21,262 (N.D. Ill. 1979); *Schultz* v. *Green Bay & Western Railroad Co.*, 85 CCH Lab. Cas. ¶ 11,072 at 20,187 (E.D. Wis. 1979); *Rozas* v. *Cameron Iron Works, Inc.*, 83 Lab. Cas. ¶ 10,407 at 17,625 (S.D. Tex. 1977); *Hirschberg* v. *Braniff Airways, Inc.*, 404 F. Supp. 869, 872-74 (E.D.N.Y. 1975); *Stinner* v. *United States Steel Corp.*, 73 CCH Lab. Cas. ¶ 14,352 at 29,127 (W.D. Pa. 1974). Courts have also held that, regardless of whether a plaintiff should be affected by dilatoriness on the part of the Government, a plaintiff should not lose his rights while his claim is subjected to good-faith negotiations. *Farrell* v. *Chesapeake and Ohio Railway Co.*, 77 CCH Lab. Cas. ¶ 11,157 at 19,952 (W.D. Pa. 1975); *Smith* v. *Industrial Employers and Distributors Association*, 385 F. Supp. 1281, 1287 (N.D. Cal. 1974), *aff'd*,

history and statutory text of [the 1974) amendments, we have concluded that the congressional intent dictates that a *uniform* six-year limitations period be adopted in cases presenting this laches question." We fail to understand the basis for the Department's conclusion. There is no indication in the legislative history of any intent to establish any specific time period to act as a period of limitation, nor is there any mention of the statutes cited by appellants.

546 F.2d 314 (9th Cir. 1976) *cert. denied*, 431 U.S. 965 (1977); *Ufland* v. *Buffalo Courier Express, Inc.*, 74 CCH Lab. Cas. ¶ 10,308 at 17,077 (W.D.N.Y. 1974); *Muscianese* v. *United States Steel Corp.*, 354 F. Supp. 1394, 1400 (E.D. Pa. 1973).

Various considerations underlie the decision of whether time spent by the Government in processing a claim should be allowed to prejudice a plaintiff's right to sue for enforcement of federally granted rights.[15] A committee report, which is part of the legislative history of the 1974 amendment of the veterans' reemployment rights statute, suggests that it is inappropriate to charge against the veteran the time spent by the Department of Labor. S. REP. No. 93-907, 93rd Cong., 2d Sess. 111-12, 113 (1974). However, the magnitude of the burden placed upon the veteran will not always outweigh the injustice that would accrue to defendant if the suit were allowed to proceed. The prosecution of stale claims is certainly not a satisfactory norm. Claims should be closely scrutinized and the doctrine of laches is applicable to appropriate factual situations.

While it cannot be disputed that the Department of Labor has unfairly treated the veterans in this case, we note that they voluntarily chose to rely upon the services of the Department rather than secure private counsel. It is necessary to consider the perspective of McDonnell Douglas. (McDonnell Douglas justifiably relied upon a long-standing endorsement of its employment practices and the Department has not proferred

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[15] We note that this circuit has previously held that inordinate delay by a government agency, which severely prejudices a defendant, may serve to preclude relief on behalf of underlying private parties seeking redress for federal statutory violations. *EEOC* v. *Westinghouse Electric Co.*, 592 F.2d 484 (8th Cir. 1979); *EEOC* v. *Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978); *but see Bernard* v. *Gulf Oil Co.*, 596 F.2d 1249, 1257 (5th Cir. 1979). *Leimbach* v. *Califano*, 596 F.2d 300, 305 (8th Cir. 1979), is distinguishable on the basis that it involved public funds.

any excuse for its sudden reversal of position or for holding the claims in abeyance for a lengthly period of time. Broadly speaking, the Department has misled all parties by its dilatory processing of complaints and its equivocations.)

The determination of whether a delay is inexcusable is closely intertwined with the issue of whether a defendant suffered prejudice from the delay. *Public Administrator of the County of New York* v. *Angela Compania Naviera, S. A.*, 592 F.2d 58, 64 (2d Cir. 1969), *appeal docketed,* No. 78-1695 (U. S. Sup. Ct. May 11, 1979), *quoting Larios* v. *Victory Carriers, Inc.*, 316 F.2d 62, 63-64 (2d Cir. 1963). If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice required before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required. *Brundage* v. *United States,* 504 F.2d 1382, 1384-87 (Ct.Cl. 1974), *cert. denied,* 421 U.S. 998 (1975); *Grisham* v. *United States,* 392 F.2d 980, 983 (Ct. Cl.), *cert. denied,* 393 U.S. 843 (1968).

In an affidavit in support of the motion to dismiss, the vice-president of personnel of McDonnell Aircraft Co. asserted that "[s]ubstantial prejudice has resulted from the reliance which the Company reasonably placed on the determination of the Department in these matters before 1972." In particular, McDonnell Douglas claims prejudice on the basis that seventy-four percent of the potential liability of the appellants' claim is no longer recoverable because the government contracts, against which was charged the billable work during the 1964-1972 period, have since been closed in whole or part, and many employees who worked on matters related to this suit have retired, transferred, quit or died. (The latter assertion of prejudice, the unavailability of relevant testimony, falls within the category of prejudice generally recognizable in a determination of laches.) Although the basic facts relevant to the merits of this

controversy appear to be generally available in the record, we will not second-guess the District Court's finding that testimony which may be unavailable because of the delay might clarify the foreseeability of upgrading.[16]

Whether McDonnell Douglas's inability to recover the amount of potential damages is cognizable as an element of prejudice presents a more difficult issue.[17] This alleged prejudice is first contingent upon a finding that McDonnell Douglas's practice violated the statutory reemployment rights of the veterans.

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[16] Progession through the ten-week segments was automatic as was promotion upon qualification in the absence of a freeze, but the ten-week test period and whether a freeze would be put into effect involved company discretion, the limits of which may be relevant to the underlying dispute in this case.

[17] Not all prejudice to a defendant will be recognized as supporting a defense of laches. "The prejudice normally contemplated in applying laches * * * stems from such factors as loss of evidence and unavailability of witnesses, which diminish a defendant's chances of success." *Powell* v. *Zuckert,* 366 F.2d 634, 638 (D.C. Cir. 1966). *See also Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 440-41 (1975) (Marshall, J., concurring); *Hill* v. *W. Bruns & Co.,* 498 F.2d 565, 568 (2d Cir. 1974); *Esso International, Inc.* v. *S S Captain John,* 443 F.2d 1144, 1150 (5th Cir. 1971); *Schultz* v. *Green Bay and Western Railroad Co.,* 85 CCH Lab. Cas. ¶ 11,072 at 20,188 (E.D. Wis. 1979); *Watkins* v. *Consumers Power Co.,* 80 CCH Lab. Cas. ¶ 11,912 at 22,586 (E.D. Mich. 1977). The broad equitable perspective necessary to a determination of laches encompasses, however, a greater range of evidence. As stated in *Tobacco Workers International Union Local 317* v. *Lorillard Corp.,* 448 F.2d 949, 958 (4th Cir. 1971):

> There are two kinds of prejudice which might support a defense of laches: (1) the delay has resulted in the loss of the evidence which would support the defendant's position; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.

See also United States ex rel. Arant v. *Lane,* 249 U.S. 367, 372 (1919); *Galliher* v. *Cadwell,* 145 U.S. 368, 372 (1892).

Therefore it might be concluded that any prejudice of this nature would stem from McDonnell Douglas's violation of a federal statute rather than from the delay in bringing suit. Nevertheless, McDonnell Douglas claims that it would have been able to force the Federal Government to pay the damages arising from the statutory violations if this suit had commenced earlier,[18] and furthermore asserts that it would have corrected any impropriety in its employment policies if the Department of Labor had informed it of its interpretation of illegality at an earlier date. Although we reject the contention that the cost of litigation or the payment of lost wages by itself could constitue prejudice within the contemplation of a laches defense, *see Watkins* v. *Consumers Power Co.*, 80 CCH Lab. Cas. ¶11,912 at 22,586 (E.D. Mich. 1977), McDonnell Douglas's argument asserts prejudice of a greater breadth. McDonnell Douglas relied upon an interpretation of a government agency that the agency later repudiated. This reliance was promoted by the veterans' failure promptly to institute litigation; thus to some degree the delay by the veterans caused the prejudice resulting from reliance upon the Department's prior endorsement of McDonnell Douglas's practice.

This suit involves a delicate balancing of equities, where both the appellants and the appellee have suffered at the hands of a government agency. The procrastination and sudden reversal of position of the Department of Labor affected both parties, but the District Court concluded that greater injury fell to McDonnell Douglas. McDonnell Douglas attempted to provide the veterans with their reemployment rights by following an interpretation of the Veterans Reemployment Rights Act that was

[18] The credibility of this claim is best left to the District Court, as it involves numerous factual determinations. The actual government contracts under which this recovery would be possible are not contained in the record before tnis court, and the assertions by McDonnell Douglas do not provide details regarding the provisions for recovery or when the contracts actually closed.

endorsed by the Department of Labor. The policy practiced did give special treatment to the veterans by reinstating them directly into a test period. Thus, only minimal deprivation of statutory rights could possibly have resulted from McDonnell Douglas's practices, and any loss to the veterans from the violation, if any, of their statutory reemployment rights has been mitigated by the change of McDonnell Douglas's practice in 1972 as a result of the collective bargaining agreement.

The situation here presents a special and extraordinary circumstance which must be woven into the web of factors involved in the determination of whether equitable considerations favor barring the suit on the basis of laches. Indeed, the flexabile nature of this equitable doctrine is designed to permit exceptional circumstances to carry great weight. We cannot say that the District Court abused its discretion in balancing the equities and finding that laches requires the dismissal of this suit.

Judgment affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 77-1046C (1)

William E. Goodman, et al.,
Plaintiffs,
v.
McDonnell Douglas Corporation,
Defendants.

(Filed August 25, 1978)

MEMORANDUM

This matter is before the Court on the motion of plaintiffs for partial summary judgment and on the motion of defendant to dismiss. For the reasons stated below, plaintiffs' motion will be denied and defendant's motion sustained.

This is an action by former veterans of the United States Armed Forces against their employer, defendant McDonnell Douglas. Each plaintiff left permanent employment with defendant to enter active duty with the armed services. Each plaintiff was honorably discharged and thereafter made application for reemployment with defendant. With the exception of plaintiff Ron Endy, each plaintiff was reinstated prior to January 1, 1972.

However, each plaintiff complains that defendant violated the Veterans Reemployment Rights Act, 38 U.S.C. §2021, et seq., by denying them immediate placement upon their return in a higher grade of job classification.

Defendant contends that all employees were treated equally and that upgrading was the result of a two-step process involving managerial discretion. Plaintiff allege upgrading was automatic.

Whether the upgrading was automatic or discretionary presents a crucial issue of material fact and, therefore, bars summary judgment. Rule 56, F.R.C.P. 28 U.S.C.; *Ozark Milling Company* v. *Allied Mills, Inc.*, 480 F.2d 1014, 1015 (8th Cir. 1973). Therefore, plaintiffs' motion will be denied.

Defendant contends this action should be dismissed under the doctrine of *laches*. The Court agrees.[1]

Two elements must be satisfied in order to dismiss an action on the defense of *laches*. The defendant must show inexcusable delay and resulting prejudice. Both are present in this case.

Throughout the 1960's the Department of Labor impliedly approved defendant's policy exercised with respect to veterans. In 1972 the defendant changed its policy. It is clear that no damages could accrue after that date. However, none of the plaintiffs filed suit until September 29, 1977.

It is clear that a returning veteran must promptly assert his rights under the Act. *Cruca* v. *United States Steel Corporation*, 495 F.2d 1252, 1295 (3rd Cir. 1974). The fact that the government was in limbo with respect to its position on defendant's policy does not excuse the plaintiffs' delay. *Id.*

Although, *laches* is a flexible concept which is shaped by the needs of equity, courts commonly apply an analogous state statute of limitations in determining what is a reasonable period of time. *Ruffing* v. *United Steel Corporation*, 76 L.C. ,10,857 (E.D. Pa. 1975). The analogous statute of limitations in

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[1] It should be noted that actions under the Act are equitable in nature. 38 U.S.C. §2020, *Leonick* v. *Jones & Laughlin Steel Corp.*, 258 F.2d 48 (2nd Cir. 1958).

Missouri for contract actions is five years. Sec. 516.120, R.S.Mo. Since defendant changed its upgrading policy in the new collective bargaining agreement entered in 1972, it is undisputed that no injury could have occurred after May 15, 1972. Assuming, *arguendo,* that 1972 is the focal date, plaintiffs still did not file within five years. This is clearly inexcusable delay.

Furthermore, defendant would be unreasonably prejudiced by this action. At some point the defendant has the right to expect that stale claims will be barred by *laches. Ruffing* v. *United Steel Corporation,* 76 L.C. ¶10,857, p. 18, 878.

There is little doubt that certain relevant witnesses and relevant records would not be available. Those witnesses who are available would have a memory eroded by time. Finally, to require McDonnell Douglas to defend this action would result in just the prejudice *laches* is intended to prevent. It is this Court's opinion that plaintiffs' complaint should be dismissed for failure to bring this action within a reasonable time under the Act. *Burke* v. *Gateway Clipper, Inc.,* 441 F.2d 946, 949 (3d Cir. 1971).

Accordingly, defendant's motion to dismiss will be granted and plaintiffs' complaint will be dismissed with prejudice.

Dates this 25 day of August, 1978.

J. H. Meredith
United States District Judge

APPENDIX C

STATUTES INVOLVED

39 U.S.C. §2021 (Supp. V, 1975) provides in pertinent part as follows:

> P. 303 (a) In the case of any person who is inducted into the Armed Forces of the United States under the MIlitary Selective Service Act (or under any prior of subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * *
>
> P. 304 (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> > (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status and pay * * *.
>
> * * * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. * * *.
>
> P. 304 (b) (1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B)

of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

* * * * *

38 U.S.C. §2022 (Supp. V, 1975) P. 310 provides as follows:

> If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b) (1), or (b) (3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision there of exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such

> compensation shall be in addition to and shall not be deemed to dimished any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district, or in which such State or political subdivision thereof exercises authority or carries out is functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution, thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to an proceedings under this chapter.

38 U.S.C. §2024(a) (Supp. V, 1975) P. 315 provides in pertinent part as follows:

> (a) Any person, who, after entering the employment on the basis of which such person claims restoration of reemployment, enlists in the Armed Forces of the United States . . . shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted . . . .